"An Old Fashioned Crazy Quilt:"[1] New Developments in the Sixth Amendment, Discovery, Mental Responsibility, and Nonjudicial Punishment

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Introduction

This article discusses appellate courts' pronouncements during the past year in the areas of Sixth Amendment, discovery, mental responsibility, competency to stand trial, and nonjudicial punishment. Nineteen ninety-six can best be described as a year of ebb and flow as the courts further restricted some aspects of an accused's rights to confrontation and compulsory process, while rejecting other attempted inroads. Judge Gierke is quickly becoming the Confrontation Clause expert for the Court of Appeals for the Armed Forces[2] (CAAF), as he authored the majority opinions for nearly all the confrontation cases this term. Those cases illustrate the give and take described above and reflect Judge Gierke's position as a moderate on the court.[3]

Right to Confrontation

One of the major issues involving the Confrontation Clause[4] involves the tension created by the admission of hearsay against an accused. As most criminal law practitioners recognize, the rules prohibiting certain types of hearsay[5] and the Confrontation Clause have significant overlap. In fact, an extreme view of the Confrontation Clause might be that it excludes all hearsay, because the admission of any hearsay would enable a declarant to testify against an accused without facing him.[6] At the opposite end of the spectrum, one could argue that the Confrontation Clause guarantees only that an accused faces those witnesses who actually appear in court and testify against him.[7] The Supreme Court long ago rejected both views as unintended and too extreme.[8] Instead, the Court established a methodology to analyze out-of-court statements for Sixth Amendment protections.

First, if the out-of-court statement is admitted as a firmly-rooted hearsay[9] exception, then no further Confrontation Clause analysis is needed.[10] That is because of the long-standing nature of these exceptions, and because the rationale for their status as hearsay exceptions already supports their reliability.[11] For example, the medical treatment exception[12] is pre-

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1. *See infra* note 5; *see also* Ralph H. Kohlmann, *The Presumption of Innocence: Patching the Tattered Cloak After Maryland v. Craig*, 27 ST. MARY'S L.J. 389 (1996) (adopting the textile metaphor for constitutional protections of the accused).

2. On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994), changed the names of the United States Court of Military Appeals and the United States Courts of Military Review. The new names are the United States Court of Appeals for the Armed Forces, the United States Army Court of Criminal Appeals, the United States Navy-Marine Corps Court of Criminal Appeals, the United States Air Force Court of Criminal Appeals, and the United States Coast Guard Court of Criminal Appeals. For the purposes of this article, the name of the court at the time that a particular case was decided is the name that will be used in referring to that decision.

3. *See* Lawrence J. Morris, *Military Justice Symposium: Foreword*, ARMY LAW., Mar. 1996, at 3 (Judge Gierke was in "the middle of the pack in terms of opinions written and the ability to marshall other judges to his viewpoint").

4. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . .").

5. Hearsay is defined as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MANUAL FOR COURTS-MARTIAL, United States, MIL. R. EVID. 801(c) (1995 ed.) [hereinafter MCM]. The rule, however, is "riddled with exceptions developed over three centuries." Ohio v. Roberts, 448 U.S. 56, 62 (1980). There are so many exceptions that they amount to "an old-fashioned crazy quilt made of patches cut from a group of paintings by cubists, futurists and surrealists." *Id.* (quoting Morgan & Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 921 (1937)). Certain statements are "exempted" from the definition of hearsay. MIL. R. EVID. 801(d). Exceptions are found in MIL. R. EVID. 803 & 804.

6. *Roberts*, 448 U.S. at 63 (a literal reading of the Confrontation Clause would exclude any statement made by a declarant not present at trial).

7. White v. Illinois, 502 U.S. 346, 359-60 (1992) (Thomas, J., concurring) (this was the view held by Professor Wigmore and endorsed by Justice Harlan in his concurring opinion in Dutton v. Evans, 400 U.S. 74, 93-100 (1970)).

8. Bourjaily v. United States, 483 U.S. 171, 182 (1987) ("we have attempted to harmonize the goal of the Clause--placing limits on the kind of evidence that may be received against a defendant--with a societal interest in accurate factfinding"); *see also White*, 502 U.S. at 352 (citing Mattox v. United States, 156 U.S. 237 (1895) (such a narrow reading is inconsistent with Supreme Court rulings dating back to the 19th century)); Tom Patton, Comment, *Sixth Amendment's Confrontation Clause--Is a Showing of Unavailability Required?*, 17 S. ILL. U. L.J. 573, 574 (1993) (Supreme Court has steered a middle ground); John L. Ross, *Confrontation and Residual Hearsay: A Critical Examination, and a Proposal for Military Courts*, 118 MIL. L. REV. 31, 36-37 (1987) (The Supreme Court has embraced neither view of the right of confrontation).

mised on the assumption that a patient is likely to give accurate information to her doctor if she wants to get well.[13] The basis for the excited utterance exception[14] is the notion that while under the stress of a startling event, people do not have time to fabricate a story.[15] The circumstances under which these statements are made provide indicia of reliability, so cross-examination will not add anything.[16] For that same reason, no further Confrontation Clause analysis is needed.

When a statement does not fall within a firmly-rooted hearsay exception, the Supreme Court has set out a two-prong analysis to ensure compliance with the Confrontation Clause. First, the prosecution must either produce the witness or demonstrate his unavailability.[17] Second, an out-of-court statement will be admitted only if it bears "adequate indicia of reliability." The proponent establishes reliability by showing that the statement has "particularized guarantees of trustworthiness."[18]

Some of the exceptions that the Supreme Court has labeled as firmly-rooted are statements for the purpose of medical treatment,[19] spontaneous declarations,[20] co-conspirators statements[21] and dying declarations.[22] Recently, the CAAF added the hearsay exception for statements against interest[23] to the list of firmly-rooted exceptions.

In *United States v. Jacobs*,[24] the accused was charged with introducing drugs aboard a military aircraft with the intent to distribute them. At his court-martial, the statement a Staff Sergeant (SSG) Lawrence made to law enforcement authorities was admitted against the accused as a statement against interest.[25] Although the statement was largely exculpatory, SSG Lawrence did admit to marijuana use, conspiracy to distribute and attempted distribution of marijuana.

In deciding whether the statement was properly admitted against the accused, the CAAF determined that the statement

9. Firmly rooted hearsay exceptions "rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection.'" *Roberts*, 448 U.S. at 66 (quoting Mattox v. United States, 156 U.S. 237, 244 (1895)). When the statement falls within a firmly rooted hearsay exception, then reliability can be inferred. *Id.*

10. *White*, 502 U.S. at 356; *Bourjaily*, 483 U.S. at 183.

11. *Bourjaily*, 483 U.S. at 183.

12. *See* MCM, *supra* note 5, MIL. R. EVID. 803(4).

13. *White*, 502 U.S. at 356; MCM, *supra* note 5, MIL. R. EVID. 803(4) analysis, app. 22, at A22-52.

14. MCM, *supra* note 5, MIL. R. EVID. 803(2).

15. *White*, 502 U.S. at 356; STEPHEN A. SALTZBURG, ET AL., MILITARY RULES OF EVIDENCE MANUAL 792 (3d ed. 1991).

16. *White*, 502 U.S. at 357 ("adversarial testing" would not contribute to the statement's reliability).

17. *Roberts*, 448 U.S. at 65. *Ohio v. Roberts* involved the use of preliminary hearing testimony against the defendant when a witness failed to appear at trial. The Supreme Court applied the two-prong test set out in the text above and held that the government had established that the witness was unavailable for Sixth Amendment purposes and the testimony had "sufficient indicia of reliability." *Id.* at 68-77.

18. *Id.* at 66.

19. *White*, 502 U.S. at 355 n.8.

20. *Id.*

21. *Bourjaily*, 483 U.S. at 183. Although a statement made by a co-conspirator is technically an exemption from the hearsay rule and not an exception, the Sixth Amendment analysis is the same. United States v. Inadi, 475 U.S. 387, 393 n.5 (1986).

22. *Roberts*, 448 U.S. at 66 n.8 (citing Pointer v. Texas, 380 U.S. 400, 407 (1965)); Mattox v. United States, 156 U.S. 237, 243-44 (1895)).

23. MCM, *supra* note 5, MIL. R. EVID. 804(b)(3).

24. 44 M.J. 301 (1996).

25. *Id.* at 302 (citing MCM, *supra* note 5, MIL. R. EVID. 804(b)(3)). SSG Lawrence was in a Japanese jail at the time of accused's court-martial in the Philippines. According to the story SSG Lawrence gave to Office of Special Investigations (OSI) agents at the time of his apprehension, he first met the accused at a bar in the Philippines, where the accused was stationed and SSG Lawrence was on temporary duty from Japan. After casual conversation, the accused said he would soon be transferring to Japan and expected he would be overweight in his household goods. The accused asked SSG Lawrence to pick up and store several boxes he would mail to Japan. After SSG Lawrence returned to Japan, the accused telephoned him and giving a different name, told him that the boxes were already on their way. SSG Lawrence picked them up at his workplace without knowing the contents, took them home, later opened the boxes and discovered they contained drugs. He then used some of the drugs and resealed the boxes. The accused called SSG Lawrence again and told him to meet a third person, who, unbeknownst to both the accused and SSG Lawrence, was an undercover OSI agent. Eventually SSG Lawrence arranged for transfer of the drugs to the undercover agent and was later apprehended. There were 106 pounds of marijuana in the boxes the accused shipped to Japan. *Id.* at 302-04.

against interest exception is firmly-rooted. Judge Gierke, writing for the court, recognized that as recently as 1994, the Supreme Court expressly declined to decide this very issue.[26] The CAAF then examined its inconsistent rulings in the area.

In *United States v. Dill*,[27] in a two-to-one majority decision authored by Judge Cox, the Court of Military Appeals examined the statement against interest exception and held that it was not "firmly-rooted."[28] Two years later, writing for the court in *United States v. Wind*,[29] Judge Everett called the statement against interest a "well-established exception" and concluded that no further demonstration of reliability was needed.[30]

The *Jacobs* court then looked to the various federal circuits and found that a majority of them treat the exception as "firmly-rooted."[31] The CAAF followed that approach, cautioning, however, that SSG Lawrence's statement should be examined to ensure that all parts of it were truly inculpatory, and remanded the case to the Air Force Court of Criminal Appeals.[32]

The CAAF's conclusion that its most recent precedent treated the exception as "firmly-rooted" may not be precise. In *Wind*, Judge Everett called the exception for statements against interest "well-established" and, comparing it to the former testimony exception, noted that such a characterization obviated the need for any separate reliability analysis. He also noted that the proponent of such a statement must still demonstrate unavailability of the declarant and that the statement indeed falls within the hearsay exception. Unavailability, however, need not be established when the statement falls within a "firmly-rooted" hearsay exception.[33] Judge Everett's use of the term "well-established" was not intended to confer "firmly-rooted" status on the exception, as reflected by his reference to the former testimony exception as "well-established."[34] On more than one occasion, the Supreme Court has announced that, to admit former testimony, one must show unavailability of the declarant.[35]

"Well-established" does not equal "firmly-rooted," and the CAAF's willingness to abandon its earlier caution with respect to statements that are "presumptively suspect"[36] is disturbing. The concern is especially acute when, as happened in this case, the statement is made by a co-accused to a law enforcement agent. The statement may be technically against the declarant's interest, but it is usually an attempt to shift blame, typically to the accused, and curry favor with law enforcement.[37] This fact may be lost on the factfinder if the statement is not subject to the rigors of cross-examination, the "greatest legal engine ever invented for the discovery of the truth."[38] In addition, the pres-

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26. Williamson v. United States, 512 U.S. 594 (1994).

27. 24 M.J. 386 (C.M.A. 1987).

28. *Id.* at 388 ("statements against penal interest are of recent derivation and are not 'firmly rooted' exceptions to the hearsay rule").

29. 28 M.J. 381 (C.M.A. 1989).

30. *Id.* at 385.

31. *Jacobs*, 44 M.J. at 306. The CAAF found that the following jurisdictions treat the statement against interest as "firmly-rooted": United States v. Saccoccia, 58 F.3d 754, 779 (1st Cir. 1995), *cert. denied*, 116 S. Ct. 1322 (1996); Jennings v. Maynard, 946 F.2d 1502, 1506 (10th Cir. 1991); United States v. Taggart, 944 F.2d 837, 840 (11th Cir. 1991); United States v. York, 933 F.2d 1343, 1363 (7th Cir.), *cert. denied*, 502 U.S. 916 (1991); Berrisford v. Wood, 826 F.2d 747, 751 (8th Cir. 1987), *cert. denied*, 484 U.S. 1016 (1988); United States v. Katsougrakis, 715 F.2d 769, 776 (2d Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984). A few courts do not extend special treatment to the exception. United States v. Flores, 985 F.2d 770, 778-80, *reh'g denied*, 1 F.3d 1239 (5th Cir. 1993); Olson v. Green, 668 F.2d 421, 428 (8th Cir.), *cert. denied*, 456 U.S. 1009 (1982).

32. *Jacobs*, 44 M.J. at 306-07.

33. *Inadi*, 475 U.S. at 392; *Bourjaily*, 483 U.S. at 183; *White*, 502 U.S. at 357. *See supra* text accompanying note 10.

34. In addition, one must look at the context in which Judge Everett concluded that the statement against interest is a "well-established" hearsay exception. That sentence immediately follows his rejection of the then-existing distinction between statements against penal interest and those against pecuniary interest. *Wind*, 28 M.J. at 381.

35. Motes v. United States, 178 U.S. 458 (1900); Barber v. Page, 390 U.S. 719 (1968); *Roberts*, 448 U.S. at 74.

36. *Dill*, 24 M.J. at 387 (quoting Lee v. Illinois, 476 U.S. 530, 541 (1986)); *see also* United States v. Greer, 33 M.J. 426 (C.M.A. 1991), where a Filipino national was apprehended and questioned for possession of stolen military property. He was advised of his rights under Filipino law and was told that anything he said could be used *for* and against him. *Id.* at 430. The CMA concluded that, even though he admitted selling stolen property for the accused, the suspect believed his statement would help him avoid a prosecution. Admission of the statement against the accused was improper because the proper focus for admissibility is the declarant's motivation for the statement, not whether it could be used as evidence against him at trial later on. *Id.*

37. In *Williamson v. United States*, 114 S. Ct. 2431 (1994), the Supreme Court recognized this danger. Harris was arrested for driving with nineteen kilograms of cocaine in his trunk. He told a Drug Enforcement Administration (DEA) agent that the cocaine belonged to Williamson and that he was transporting it for him. The agent promised Harris that his cooperation would be reported to the Assistant United States Attorney. Harris refused to testify at Williamson's trial, and his statement to DEA was admitted against the defendant. *Id.* at 2433-34. The Court held that only those portions of Harris's statement that were truly inculpatory could be admitted against Williamson. The Court noted that self-exculpatory statements do not become reliable just because they are made along with inculpatory ones. *Id.* at 2435.

ence of the witness in court ensures that the declarant is under oath and understands the seriousness of the proceedings, and that the factfinder can observe the declarant's demeanor.[39]

One exception that the Supreme Court has clearly stated is not "firmly-rooted" is the residual hearsay exception.[40] It does not have the long tradition of judicial and legislative deference accorded it that other hearsay exceptions have. In fact, the residual hearsay exception was created to afford judges the flexibility to admit probative and reliable evidence that would not otherwise be admitted.[41] For residual hearsay then, the two-prong analysis described above applies.[42]

In *United States v. Ureta*,[43] the CAAF addressed the admissibility of a videotaped interview of a child abuse victim under the residual hearsay exception. The allegations initially came to light when the thirteen year-old daughter of the accused told a friend that her father had been abusing her.[44] As part of the law enforcement investigation, she was examined by a pediatrician and then interviewed by Office of Special Investigations (OSI) agents. This interview was videotaped and the friend and friend's mother accompanied the victim during the interview. On tape, the victim said that her father had been fondling her for about four years and had been having sexual intercourse with her for the previous two years.[45]

Immediately before the Article 32[46] investigation, the victim recanted her statement and refused to cooperate in the prosecution of her father who had been charged with indecent acts, carnal knowledge, and rape. At the father's court-martial, the judge admitted the OSI interview as residual hearsay over defense objection.[47] On appeal, the correctness of that ruling was reviewed. The CAAF first pointed out that, where an out-of-court statement is proffered and the declarant does not testify, only the "circumstances surrounding the making of the statement" may be considered.[48] The CAAF looked to the factors that the Supreme Court has identified as relevant in a child abuse scenario, which include: spontaneity of the statement; consistent repetition; mental state of the declarant; and existence of a motive to fabricate.[49] The CAAF also identified additional factors, including the use of non-leading questions, the interviewer's emphasis on truthfulness and whether the statement is against the declarant's interest.[50]

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38. California v. Green, 399 U.S. 149, 158 n.11 (1970) (citing 5 Wigmore 1367).

39. *Williamson*, 114 S. Ct. at 2434 ("out-of-court statements are subject to particular hazards").

40. Idaho v. Wright, 497 U.S. 805, 817 (1990) (residual hearsay does not share the same tradition of reliability as firmly-rooted hearsay exceptions). There are actually two residual hearsay exceptions. *See* MCM, *supra* note 5, MIL. R. EVID. 803(24) & 804(b)(5). The exceptions are known as "catch-all" provisions and are intended to allow hearsay to be admitted even thought it does not fall within any other exception. SALTZBURG ET AL., *supra* note 15, at 803, 849.

41. SALTZBURG ET AL., *supra* note 15, at 807.

42. *Wright*, 497 U.S. at 814-16.

43. 44 M.J. 290 (1996), *cert. denied*, 117 S. Ct. 692 (1997).

44. *Id.* at 292. The friend reported this to her own mother, and OSI was notified. After a brief interview by OSI, the victim went to an Air Force medical facility. *Id.*

45. *Id.* at 293.

46. UCMJ art. 32 (1988).

47. *Ureta*, 44 M.J. at 295. The victim had continued her refusal to cooperate, citing a privilege under German law, and did not appear at trial. Both sides agreed that she could not be compelled to testify and was unavailable. The judge admitted the interview under Mil. R. Evid. 804(b)(5). He made the following findings of fact regarding the trustworthiness of the tape: no leading questions were used; it was in her own words; it was voluntary, under oath, detailed, factual, and based on first-hand knowledge of the events. He also concluded that the victim was mature and understood the importance of the tape; she had no motive to lie; she lived in the accused's home and was supported by him, and she subjected herself to scorn by family and friends for alleging abuse. Finally, the judge noted the statement was made shortly after the latest incident with the accused and was similar to statements she made to her friend and the pediatrician, statements that were separately admitted under other hearsay exceptions. *Id.*

48. *Id.* at 296 (citing Idaho v. Wright, 497 U.S. 805 (1990)). *Wright* rejected the use of other evidence, such as physical evidence, a confession, or other witnesses' testimony--what it called "*bootstrapping*"--to determine reliability of the statement at issue. On the other hand, where the declarant appears and is at least available for questioning, then the Sixth Amendment is satisfied. United States v. McGrath, 39 M.J. 158 (C.M.A. 1994), *cert. denied*, 115 S. Ct. 420 (1994). In *McGrath*, the thirteen year old victim in a sexual abuse case appeared at trial but refused to testify against her father because she did not want him to go to jail. The defense did not question her. *Id.* at 160-61. *See also* United States v. Casteel, 45 M.J. 379 (1996) (admission of six year-old victim's audiotaped statement to county sheriff did not violate accused's confrontation rights when victim present in court but answered "I don't know" to series of trial counsel's questions), *cert. denied*, 117 S. Ct. 963 (1997).

49. *Ureta*, 44 M.J. at 296. The Supreme Court assembled this list of non-exclusive factors from various state and federal courts. *Wright*, 497 U.S. at 822 (citing State v. Robinson, 735 P.2d 801, 811 (1987) (spontaneity and consistent repetition); Morgan v. Foretich, 846 F.2d 941, 948 (4th Cir. 1988) (mental state of declarant); State v. Sorenson, 421 N.W.2d 77, 85 (1988) (terminology unexpected of child that age); State v. Kuone, 757 P.2d 289, 292-93 (1988) (lack of motive to fabricate)).

50. *Ureta*, 44 M.J. at 296.

The CAAF concluded that the judge did not abuse his discretion. Although statements to law enforcement officials may be more troublesome[51] when it comes to assessing reliability, here the victim's friend and mother were there to comfort her. The investigator's questions were not suggestive or leading. The interview took place only two days after the last act of abuse by the accused. The statement was against the girl's interest because it made her "homeless."[52] Finally, the CAAF addressed an issue that had been unclear after *Idaho v. Wright:* whether a court can rely on other statements made by the same declarant to different people to determine whether there is consistent repetition. Here, the answer was yes, because the statements were made shortly before the videotaped interview.[53] As there was little time for the victim to reflect on what she was doing, the other statements were relevant circumstances surrounding the making of the statement to the OSI agent.

Another case involving a videotape of a child witness admitted as residual hearsay is *United States v. Cabral*.[54] In that case, the accused's wife baby-sat the victim, a four year-old girl. After the girl's mother picked her up one day from the accused's home, the girl said she was hurt.[55] The mother reported the incident, and OSI agents videotaped an interview with the girl. During the first twenty minutes, the agent did not operate the video camera because he was trying to establish rapport with the child.[56] At the accused's court-martial, the child appeared but refused to answer any questions. The judge found her unavailable and admitted the videotape as residual hearsay.[57]

The Air Force court concluded that the judge did not abuse his discretion in admitting the videotape. Agreeing with the judge that the taped interview was reliable, the court focused on the child's description of sexual acts, which was atypical for her age. The court also observed that the agent explained why the whole interview was not taped, that leading questions did not prompt the girl's statements, and that no motive to fabricate existed.[58] The court did caution, however, that future interviews should be videotaped in their entirety, rather than just selective portions.[59]

The appellant also argued that a taint hearing should have been conducted.[60] The Air Force court declined to order such a hearing, concluding that suggestiveness and coerciveness, if any, should be part of the totality of circumstances the judge considers in making his reliability assessment.[61]

Another issue involving the Confrontation Clause is the use of alternative forms of testimony. In *Maryland v. Craig*,[62] the Supreme Court held that the right of confrontation is not absolute and may be limited when there are important public policy concerns at stake. Protection of vulnerable children from further trauma is one of those concerns.[63] In *Craig*, a six year-old girl was afraid of the accused and was allowed to testify from

51. *See, e.g.*, United States v. Cordero, 22 M.J. 216 (C.M.A. 1986) (interrogation techniques may often result in a statement that is more the product of the investigator than the declarant). *But see* United States v. Hughes, 28 M.J. 391 (C.M.A. 1989) (statement made to law enforcement agent reliable because made by a well-educated and intelligent adult, during a short interview conducted at declarant's workplace; declarant controlled direction of interview and had no motive to lie).

52. *Ureta*, 44 M.J. at 297. The CAAF relied on United States v. Pollard, 38 M.J. 41, 50 (C.M.A. 1993) for this proposition. In *Pollard*, however, the nine year-old boy, who witnessed his father's abuse of his sister, was told by his mother that if he said anything about his father he could not come home and would be placed in a foster home. *Id.* at 45. In *Ureta*, no such threat was ever made and there was no evidence that the victim thought she would have to leave her home if she made such an allegation. The trial judge also pointed out that the victim subjected herself to ridicule and social stigma among her family and friends by making the allegation against her father. *Ureta*, 44 M.J. at 295.

53. *Ureta*, 44 M.J. at 297.

54. 43 M.J. 808 (A.F. Ct. Crim. App. 1995).

55. *Id.* at 809. The girl's exact words were: "I'm hurt, my hoi." The mother knew that the term hoi referred to vagina. Upon examination of the girl's genitals, the mother discovered redness. When the mother asked why it was red, the girl said that the accused played too rough. She then rubbed her hand up and down on her vagina. *Id.*

56. *Id.* The opinion indicates that the interviewer asked only one leading question during the interview: whether "[Cabral] showed the girl his 'ding dong.'" *Id.*

57. *Id.* at 810. The judge relied on Mil. R. Evid. 804(b)(5).

58. *Id.* at 811.

59. *Id.*

60. *Id.* at 810. The term "taint hearing" in connection with child sexual abuse was first used by the New Jersey Supreme Court in State v. Michaels, 642 A.2d 1372 (1994) (after finding evidence that investigators used suggestive and coercive questioning techniques with a number of young children at a day care center, the court overturned the conviction and directed that, before a new trial could proceed, a "taint hearing" had to be conducted to ensure that any in-court testimony had not been influenced by the improper questioning).

61. *Cabral*, 43 M.J. at 812 (citing United States v. Geiss, 30 M.J. 678 (A.F.C.M.R.), *pet. denied*, 32 M.J. 45 (C.M.A. 1990)); *see also* Stephen R. Henley, *Postcards from the Edge: Privileges, Profiles, Polygraphs, and Other Developments in the Military Rules of Evidence*, ARMY LAW., Apr. 1997, at 92.

62. 497 U.S. 836 (1990).

another room via closed circuit television. Her testimony was then transmitted into the courtroom, where the accused, judge and jury were located.[64] The Supreme Court upheld the procedure because a case-specific showing had been made to justify use of the special accommodations.[65] Since *Craig* was decided in 1990, most of the cases stemming from it have involved removing the victim from the courtroom. There has been legislative response as well. Federal law now provides explicit authorization for federal courts to utilize two-way closed circuit television in child abuse cases.[66]

United States v. Longstreath[67] is another case involving removal of the victim from the courtroom. Seaman Longstreath was actually court-martialed twice for child sexual abuse. He was first convicted in the Philippines in 1987 for carnal knowledge, sodomy, and indecent acts with his thirteen year-old step-daughter. He was sentenced to ninety days confinement and, upon his release, was transferred to a new duty station.[68] In 1989, additional allegations surfaced, this time involving the original victim and the accused's two biological daughters. At the time the case went to trial, the victims' ages were sixteen, ten and two. A clinical psychologist testified about the need for the ten year-old to testify via one-way closed circuit television.[69] The prosecutor also asked that the sixteen year old be allowed to testify via that method, but the judge initially refused.[70] After the girl experienced problems on the stand, however, the judge ultimately allowed her to testify via closed circuit television.[71]

Addressing the propriety of the use of the closed circuit television, the CAAF first looked at the federal statute.[72] The CAAF declined to decide whether the statute applies to courts-martial.[73] Even if applicable, the court concluded that, because the statute uses precatory language,[74] it does not forestall reliance on the principles in *Maryland v. Craig*. With respect to the younger girl's testimony, the judge was justified in relying on the psychologist's testimony that the girl would be traumatized by the accused. As for the teenager, although there was no expert testimony explaining why an alternative form of testimony was necessary, the judge personally observed the girl's emotional distress and problems communicating with the accused in the same room. The court found that the case specific showing of necessity had been made in both situations.[75]

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63. *Id.* at 852-53. Other concerns include accurate fact-finding, which might require the use of hearsay. *Id.* at 851. The state also has an interest in punishing child abusers and in creating both the perception and reality of fairness in the criminal justice system. Susan H. Evans, Note, *Closed Circuit Television in Child Sexual Abuse Cases: Keeping the Balance Between Realism and Idealism--Maryland v. Craig*, 26 WAKE FOREST L. REV. 471, 493-94 (1991).

64. *Craig*, 497 U.S. at 840-42. The prosecutor and one of the defendant's two defense counsel were in the room with the child, as was a technician. Evans, *supra* note 63, at 474.

65. *Craig*, 497 U.S. at 855. The showing of necessity must establish that: (1) the procedure is necessary to protect the child, (2) the child would be traumatized by the presence of the accused, and (3) the child would suffer more than de minimis emotional distress. *Id.* at 855-56.

66. 18 U.S.C. § 3509 (Supp. IV 1992). The statute requires notice five days in advance of trial and that the judge make a ruling on the necessity for the alternative form of testimony.

67. 45 M.J. 366 (1996).

68. *Id.* at 367-68. The sentence from the first court-martial also included reduction to the grade of E-5 and a reprimand.

69. *Id.* at 368. The psychologist treated the girl for approximately a year and a half. She indicated that the girl was terrified of her father and that the progress they had made during the course of the treatment would be set back if the girl had to face the accused. *Id.*

70. *Id.* at 369. After the first time she testified, the judge noted her distress but was unconvinced that it was due to the presence of the accused. The two year old did not testify at the court-martial. *Id.* at 368, 370.

71. *Id.* at 370-71. The teenager first testified on 10 January 1990. She was largely nonresponsive to questions and broke down twice during the two hours she was on the stand. The next day the government needed a delay so the trial counsel could persuade her to testify. A week later, the girl testified but was again unresponsive to many of the trial counsel's questions. Several recesses were taken but she still refused to answer many questions. The court-martial was continued for another five days, after which the witness simply refused to answer any more questions from the defense. The defense moved to strike her direct testimony. The judge deliberated overnight and then reconsidered his earlier ruling on the closed circuit television. The judge pointed to the girl's comments that it was harder to discuss things in court because the accused was present and she was not comfortable talking about the incidents in front of him. *Id.*

72. *See supra* note 66 and accompanying text. The defense had argued that the statute did apply to courts-martial and that its terms were violated because the statute authorizes the use of two-way closed circuit television and the judge allowed the government to use one-way television. *Longstreath*, 45 M.J. at 372. The lower court held that the statute did apply to courts-martial and provided guidance. United States v. Longstreath, 42 M.J. 806, 815 (N.M.Ct.Crim.App. 1995).

73. *Longstreath*, 45 M.J. at 372; *see also* United States v. Daulton, No. 45 M.J. 212 (1996).

74. That part of the statute that discusses use of two-way closed circuit television uses the term "may," whereas other parts of the statute contain "shall." The *Longstreath* court relied on this distinction as supporting a view that closed circuit television can be one-way or two-way. Using that rationale, however, one could argue that virtually any set-up is authorized by the statute. If Congress intended that other forms of testimony be available, it is surprising it did not include them in the legislation.

75. *Longstreath*, 45 M.J. at 373.

This year, some innovative judges have removed the accused, not the child victim, from the courtroom. Military courts have rejected these latest attempts as further erosion of the right of confrontation. In *United States v. Daulton*,[76] the child's therapist testified that the accused's nine year-old daughter was afraid of testifying in front of him and anybody "who might be on his side."[77] The judge ruled that the accused would watch his daughter's testimony from another room over closed circuit television. The bailiff, who accompanied the accused, acted as a conduit to the two defense counsel, who remained in the courtroom.[78]

In yet another opinion written by Judge Gierke, the CAAF held that, although the military judge properly made a case-specific showing of necessity, the courtroom arrangement was unlike any of those found acceptable in *Craig*, its military progeny or the federal statute. The court was troubled by the accused's inability to observe the reactions of the court members and their inability to observe the accused's demeanor. Another problem was the effect the accused's removal from the courtroom had on the right to counsel. The judge's ruling resulted in the accused communicating to his counsel through an intermediary, the bailiff, who was not part of the defense team and hence not covered by the attorney-client privilege.[79] The CAAF found that the arrangement violated the right of the accused to attend all sessions of court as well as his Sixth Amendment rights of confrontation and effective assistance of counsel.[80] The finding on that specification and the sentence were set aside.[81]

In a vigorous dissent, Judge Crawford contended that the accused was free to consult with his attorneys at any time, that he did in fact consult with them at some point and that any communications through the bailiff would have been privileged because the judge instructed the bailiff to act as an intermediary.[82] She also pointed out that the accused's demeanor is not relevant, because it is the *witness'* presence in front of the fact-finder that the Sixth Amendment guarantees. Finally, she concluded that the judge's instruction to the members not to draw any adverse inference from the accused's absence eliminated any problems. [83]

A service court also overturned a conviction where the accused was removed from the courtroom. In *United States v. Rembert*,[84] a psychologist testified that the thirteen year-old victim of carnal knowledge might be psychologically harmed if forced to testify in front of the accused. The accused watched her testimony via two-way television in the deliberation room. The defense counsel stayed in the courtroom and communicated with his client by cellular telephone. On appeal, the appellant argued a violation of both his Sixth Amendment right of confrontation and his Fifth Amendment right to due process.[85] The government conceded error on due process grounds. Without ruling on the Sixth Amendment, the Army court agreed that the accused's due process rights were violated.[86]

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76. 45 M.J. 212 (1996).

77. *Id.* at 215. The therapist explained that this included the accused's defense counsel. *Id*.

78. *Id.* at 216. The idea for this arrangement originated with the judge, not the trial counsel, who had suggested that the victim leave the courtroom. Defense objected to any alternative form of testimony. Once the judge issued his ruling, both defense counsel elected to stay in the courtroom. *Id.* at 215-16.

79. *See* MCM, *supra* note 5, MIL. R. EVID. 502.

80. *Daulton*, 45 M.J. at 219. Article 39 requires that the accused attend all sessions except for the deliberations of the members. UCMJ art. 39 (1988). R.C.M. 804 also articulates this right of the accused, but explains that it is waived if the accused is disruptive or voluntarily absents himself after arraignment. MCM, *supra* note 5, R.C.M. 804.

81. *Daulton*, 45 M.J. at 220. The error in the case was not harmless. The CAAF cited *Coy v. Iowa*, 487 U.S. 1012 (1988), for the proposition that one would have to speculate as to the likelihood of change in the witness's testimony or the factfinder's opinion. Instead one should look at the remaining evidence; here, no other evidence of the indecent act existed. *Daulton*, 45 M.J. at 219-20.

82. *Daulton*, 45 M.J. at 223-24 (Crawford, J., dissenting). Judge Crawford pointed to a section in the record near the end of cross-examination of the child witness, when the defense counsel briefly left the courtroom. Upon his return, no further questions were asked. Judge Crawford assumed that counsel's departure was to talk to his client. She further noted that, absent any other request for a recess, the accused waived his right to counsel. *Id*.

83. *Id*. at 222-24. Judge Crawford also spent considerable time citing cases where the admissibility of hearsay was upheld. *Id.* at 222-23 (citing United States v. Lyons, 36 M.J. 183 (C.M.A. 1992); United States v. Morgan, 40 M.J. 405 (C.M.A. 1994); United States v. Ureta, 44 M.J. 290 (1996)). Her point seemed to be that if no constitutional error was found despite the total absence of any cross-examination, then no error should exist here where the defense did cross-examine the victim. This conclusion ignores the justification for admission of hearsay with an unavailable declarant; that is, the statement must have "particularized guarantees of trustworthiness." What showing of reliability existed with respect to the in-court testimony of this victim?

In a short dissenting opinion, Judge Sullivan concluded that the accused's confrontation rights were not violated because the accused could observe the victim, albeit indirectly. He also criticized the majority for reading a requirement of two-way television into military law. *Daulton*, 45 M.J. at 220-21 (Sullivan, J., dissenting).

84. 43 M.J. 837 (Army Ct. Crim. App. 1996) (per curiam).

85. U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law").

For now it seems prudent for judges to adhere to procedures upheld by the courts or explicitly authorized by statute. These arrangements include: two-way closed circuit television,[87] one-way closed circuit television,[88] and repositioning chairs in the courtroom itself.[89]

The Confrontation Clause may also be implicated when the judge improperly limits cross-examination. Prohibiting the defense from cross-examining a rape victim on her receipt of various government benefits to which she was not entitled violated the accused's right to confront the witness according to the CAAF in *United States v. Bins*.[90] The twenty-five year old American victim had recently arrived in Greece.[91] When she got into a dispute with her Greek attorney, the Staff Judge Advocate offered her on-base housing.[92] He also provided her a meal card, per diem, and mental health counseling during a two-month period before the trial.

At trial, the defense wanted to inquire into these matters as well as her receipt of standard witness fees and the amount of the settlement.[93] The judge held that such matters were not relevant, were unfairly prejudicial and would confuse the members.[94] The CAAF disagreed, holding that, except for the receipt of standard witness fees, the matters were relevant to bias and motive to lie. The judge should have allowed the members to hear this evidence. As the defense theory was that the victim was motivated by money, her credibility was for the members to evaluate. The accused's rights to confront the witnesses against him and to present a defense were violated.[95]

Of course, the right of confrontation guarantees the opportunity for cross-examination, not necessarily that it will be effective.[96] In *United States v. Casteel*,[97] a six year-old victim of sexual abuse had difficulty testifying at the accused's court-martial. Not surprisingly, after she replied "I don't know" to nearly all of trial counsel's questions, the defense declined to cross-examine her and the girl departed.[98] The judge then admitted an audiotaped interview between the girl and a county sheriff, taken a year earlier.

On appeal, the defense argued a violation of the Confrontation Clause because the defense did not have an opportunity to cross-examine the girl after the interview was admitted at trial.[99] Judge Cox, writing for a unanimous court, rejected that

86. *Rembert*, 43 M.J. at 838. Like the CAAF, the Army court pointed to Article 39 and R.C.M. 804 as support for the right of the accused to attend all phases of his trial. *Id.*

87. 18 U.S.C. § 3509(b) (Supp. IV 1992).

88. *See supra* notes 62 to 75 and accompanying text.

89. United States v. Williams, 37 M.J. 289 (C.M.A. 1993); United States v. Thompson, 31 M.J. 168 (C.M.A. 1990), *cert. denied*, 498 U.S. 1084 (1991).

90. 43 M.J. 79 (1995).

91. *Id.* at 81. She met the accused in a bar, and they left together. After a second bar, they went to get something to eat, taking a cab at the accused's suggestion. During the ride, the accused stopped the cab and suggested they walk the rest of the way to the restaurant. After a short walk, the accused attacked the woman, threw her down on some rocks, sodomized her, and attempted to rape her several times. *Id.* As is common in many foreign countries, the victim retained a lawyer and began negotiating an out-of-court settlement. It is customary for civilian authorities to drop prosecution of the case if the victim is satisfied with the settlement.

92. *Id.* at 82. The victim became dissatisfied with her attorney's efforts so she negotiated her own settlement with the accused for $2100. The Greek authorities dropped the charges against the accused. Her attorney demanded his share and they scuffled. The Air Force Staff Judge Advocate who was monitoring the case elected to extend her benefits although she had no military entitlement. *Id.*

93. *Id.* The defense argued that this information would impeach the victim's credibility by showing that she was motivated by money. The defense also requested that the accused's Greek attorney be produced. The government opposed the witness production request and filed two motions in limine to preclude testimony on the settlement and receipt of per diem, housing, meals and counseling. *Id.* at 83.

94. *Id.* "I think her testimony is very clear that what she wants and her whole purpose was to see that the case was prosecuted, not to make any money out of it. It is this judge's opinion that this is the motivation, not money." *Id.*

95. *Id.* at 86. The court went on to conclude that the error was harmless because the victim's testimony was corroborated by other evidence and the defense successfully cross-examined her on several other matters. *Id.* at 86-87.

96. United States v. Owens, 484 U.S. 554 (1988) (no violation of defendant's confrontation rights where assault victim remembered that he earlier identified the defendant as his assailant but could not identify him in court); Delaware v. Fensterer, 474 U.S. 15 (1985) (no violation when government expert could not remember the basis for his opinion); United States v. Gans, 32 M.J. 412 (C.M.A. 1991) (admisson of prior statement to military police as recorded recollection did not violate confrontation rights).

97. No. 94-1430 (CAAF Sept. 30, 1996), *cert. denied*, 117 S. Ct. 963 (1997).

98. *Id.* slip op. at 4-5. The girl indicated she knew the difference between truth and falsehood, and knew she need to testify truthfully, but was not responsive to most of trial counsel's direct questions about the abuse of herself and other children. It should also be noted that the girl was testifying from a remote location over closed circuit television. That alternative form of testimony was not was not an issue in the CAAF case. *Id.* at 3.

argument, noting the absence of any defense request to question the girl about the tape or have the judge recall her.[100]

Compulsory Process

Not only does the Sixth Amendment allow an accused to confront witnesses against him, it also guarantees that he will be able to call witnesses in his favor.[101] This right of compulsory process is well settled in American jurisprudence.[102] In the military of course, the trial counsel exercises the right to subpoena witnesses while the command pays their expenses.[103]

The CAAF, facing a slightly different issue this year, addressed whether the defense is entitled to witnesses who will cost the government nothing to produce. Lieutenant Colonel Breeding was an Air Force chaplain charged with assault, communicating a threat, and kidnapping his wife, stepson and daughter.[104] The defense requested twenty-three witnesses to testify about various aspects of his character and his mental state. Ultimately, the judge ordered production of approximately two-thirds of the witnesses.[105]

The majority first analyzed Rule for Courts-Martial (R.C.M.) 703 and its requirement that the defense provide a synopsis of the expected testimony of its requested witnesses, sufficient to show relevance and necessity.[106] The CAAF then turned to Military Rule of Evidence 405 for a discussion of relevance as it pertains to reputation and opinion.[107] The court next conducted a detailed discussion of the foundational elements for reputation and opinion evidence.[108] Finally, the court examined the proffers of evidence for the defense witnesses in the case and concluded that they were insufficient to establish a valid basis for opinion or reputation testimony.[109]

The reader might observe that, given the number of witnesses requested and those actually produced, the judge's ruling could best be supported by arguing that many of the witnesses

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99. *Id.* at 2. The defense contended that in order to cross-examine the girl about the interview, the defense would have had to offer the tape during its case in chief or risk antagonizing the members by recalling the young girl to the stand after it was offered by the prosecution. *Id.* at 8. The defense also argued that uncharged misconduct was improperly admitted and that the tape lacked adequate indicia of reliability. *Id.* at 2. For a brief discussion of the Sixth Amendment considerations when a witness appears at trial, *see supra* note 48.

100. *Casteel*, slip op. at 7-8. Chief Judge Cox observed that the mere fact of recalling the witness to the stand would not have annoyed the members as much as hostile questioning. As for the latter, that is always a risk one takes with rigorous cross-examination. *Id.* Chief Judge Cox added that the defense probably would have gained little by cross-examining the girl because she had already testified she did not remember anything and questioning may have jogged her memory. *Id.*

101. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor").

102. Washington v. Texas, 388 U.S. 14 (1967); United States v. Nixon, 418 U.S. 683 (1974); United States v. Burr, 25 F. Cas. 30 (C.C. Va. 1807) (No. 14,692d).

103. *See* MCM, *supra* note 5, R.C.M. 703(c), (e)(2)(D) discussion.

104. United States v. Breeding, 44 M.J. 345 (1996). The granted issue was:

> Whether the judge abused his discretion both by denying certain defense requests for the production of certain witnesses and by persisting in his denial of said witnesses notwithstanding the willingness of the defense to relieve the prosecution of the expenses associated with their appearance at trial, thereby depriving appellant of his Sixth Amendment right to equal opportunity to obtain witnesses under R.C.M. 703.

Id. at 347.

105. *Id.* The judge granted three of six witnesses requested on military character and duty performance, nine of 13 on peacefulness, none on truthfulness, and five out of six on the accused's mental state. *Id.* The accused and his wife had long-standing marital problems and part of his defense at trial was her instability and volatility. *Id.*

would be cumulative because an accused has no right to present cumulative testimony.[110] The majority did briefly address this aspect of the case, although the discussion makes a curious reference to the failure of the defense to renew its request for witnesses on truthfulness after the accused testified.[111] Such a reference is interesting, because it appeared clear from the beginning of the trial that the accused would testify, and the judge never conditioned his witness production ruling on uncertainty over the defense plan in this regard.[112]

In a concurring opinion, Judge Sullivan directed his attention to the granted issue.[113] The defense had argued that the subpoena system in the military is unfair because the trial counsel controls the production of witnesses for both sides. The defense contended that an accused should be able to subpoena his own witnesses, as long as the government does not have to finance them, as in the federal courts.[114] Judge Sullivan rejected that argument and concluded that a military judge does not have

106. MCM, *supra* note 5, R.C.M. 703(b)(1). R.C.M. 703 provides in relevant part:

> (a) *In general*. The prosecution and defense shall have equal opportunity to obtain witnesses and evidence, including the benefit of compulsory process.
> (b) *Right to Witnesses*.
> (1) *On the merits or on interlocutory questions.* Each party is entitled to the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary . . . .
> . . .
> (c) *Determining which witnesses will be produced*.
> . . .
> (2) *Witnesses for the defense*.
> (B) *Contents of request.*
> (i) *Witnesses on merits or interlocutory questions*. A list of witnesses whose testimony the defense consider relevant and necessary on the merits or on an interlocutory question shall include the name, telephone number, if known, and address or location of the witness such that the witness can be found upon the exercise of due diligence and a synopsis of the expected testimony sufficient to show its relevance and necessity.

107. *Breeding*, 44 M.J. at 350 (citing MIL. R. EVID. 405).

108. *Id.* at 350-51. The court described these elements as: the name of the witness, whether the witness belongs to the same community or unit as the accused, how long the witness has known the accused, whether he knows him in a professional or social capacity, the character trait known, and a summary of the testimony about it. *Id*.

109. *Id.* at 351. The proffer on one witness read as follows:

> Major (Chaplain) Gustaf Steinhilber . . . was assigned with Lieutenant Colonel Breeding in Germany and is aware of the marital problems between LtCol Breeding and his wife. He knew LtCol Breeding from August in 1988 until LtCol Breeding left Germany for his assignment to Offutt Air Force Base, and worked closely with him throughout that time. Chaplain Steinhilber has a background [in] marital and family counseling . . . He counseled LtCol Breeding and Elizabeth Breeding concerning their marital problems roughly six times. He will testify concerning LtCol Breeding's good military character and non-violent nature. He will testify as to Mrs. Breeding's aggressiveness, her provocative and demanding attitude toward her husband, and LtCol Breeding's tendency to internalize his frustration with his wife's behavior. He will testify as to Elizabeth Breeding's mood swings, rigidity and tendency to get extremely emotional, all of which [a]ffects her credibility as well as her ability to accurately perceive the events she will be testifying about. He will testify that in his opinion Elizabeth Breeding is prone to exaggeration because she tends to [see] things as black and white, and he therefore has a poor opinion of her character for truthfulness. In the event of a conviction, Chaplain Steinhilber will also be wanted as a witness for sentencing. Chaplain Steinhilber worked with LtCol Breeding for several years and can testify as to LtCol Breeding's good duty performance as well as his personal observations of the mental suffering endured by LtCol Breeding because of the marital difficulties between himself and Mrs. Breeding. He will testify that LtCol Breeding was in a difficult position while assigned to Germany because he was an Air Force Chaplain on a base comprised primarily of Army personnel, and that LtCol Breeding did a good job under those circumstances
> .

Id. at 347. Concerning the proffer, the majority concluded that it did not show that Chaplain Steinhilber knew the accused long enough to form an opinion about him or know his reputation in the community. The fact that he interviewed them six times was not sufficient information without knowing the length or intensity of the interviews. *Id.* at 351. An offer of proof on testimony to be provided by the accused's sister was not sufficient because, although she grew up with him and they attended college together, that was twenty years prior and there was no explanation of contact since then. *Id.*

110. United States v. Harmon, 40 M.J. 107 (C.M.A. 1994) (accused had no right to present testimony of witness when three other witnesses had already provided similar testimony).

111. *Breeding*, 44 M.J. at 352. Clearly, witnesses as to truthfulness would not have been relevant at all unless the accused placed his credibility in issue. MCM, *supra* note 5, MIL. R. EVID. 608.

112. *Breeding*, 44 M.J. at 351. The judge indicated that based on the large number of witnesses involved, he might reconsider his ruling but that the argument would have to be "very persuasive." *Id. See* United States v. Sheridan, 43 M.J. 682 (A.F. Ct. Crim. App. 1995) (counsel need not renew an objection when the judge has ruled finally), *petition denied*, No. 96-0414 (CAAF Apr. 26, 1996).

113. *Breeding*, 44 M.J. at 352-54 (Sullivan, J., concurring).

authority to order a defense subpoena solely on the basis of the defense offer to pay the witness' fees. Further, this lack of authority does not violate Article 46 or constitutional rights, because the standard for both government and defense witnesses is the same--relevant and necessary.[115]

The message is clear: defense counsel need to be more detailed in their synopses of expected testimony. Notwithstanding the dictionary's definition of synopsis as " a brief statement or outline of a subject,"[116] it would appear that the CAAF's view is more exhaustive, and counsel should not hesitate to address all aspects of a witness's expected testimony when litigating the production of that witness.

Consider the defense argument that the military system for obtaining witnesses is unfair.[117] A possible alternative might be separate funding for government and defense witnesses. That raises questions, however, such as: who would oversee the defense funds and how would the funds be allocated among various accused. Occasionally, a staff judge advocate recommends alternate disposition because the command lacks the funds to try a case that will require travel of a large number of witnesses. How would the defense deal with that scenario?

Another alternative would continue command funding of witnesses, but place the power to subpoena with the military judge.[118] That way, a neutral party would rule on all witnesses. Problems are also evident with this approach, however. For example, many judges are not based at the site of the courts-martial, and judicial involvement with witness requests would only make the trial process more cumbersome. To the extent that requested witnesses are not in dispute, involving the judge seems unnecessary and inefficient.

Perhaps the defense bar would do well to remember the old adage: Be careful what you ask for, you might get it. Changing the way we produce witnesses would probably create more problems than it would solve. Any advantage the trial counsel gets under the current rules, such as learning of the defense witnesses in advance, is minimal in light of the defense's disclosure obligation to provide a list of witnesses it plans to call, regardless of the need for subpoenas.[119]

The ability to subpoena videotapes from the media was the subject of a recent decision by the Navy-Marine Corps Court of Criminal Appeals. The accused in *United States v. Rodriguez*[120] was suspected of dealing in firearms. Law enforcement organizations planned to apprehend the accused while traveling and, expecting a big bust, invited NBC News along.[121] The cameramen filmed the traffic stop, arrest and roadside interrogation of the accused. Prior to trial, the defense moved to compel production of the "outtakes" filmed by NBC.[122] NBC turned over only the broadcast material and cited a First Amendment newsgathering privilege for the remainder. The judge refused to abate the proceeding to compel production of the tapes.

In deciding whether Article 46[123] or the accused's Fifth or Sixth Amendment rights were violated, the Navy-Marine court determined that NBC likely would have prevailed on its First Amendment challenge.[124] The court concluded that the government took all reasonable steps to acquire the tapes. Additionally, the judge did not abuse his discretion in declining to abate

114. *Id.* (comparing FED. R. CRIM. P. 17 with R.C.M. 703). FED. R. CRIM. P. 17(a) states that a clerk of court can issue signed subpoenas to the parties, who then fill in the witnesses' names. Only when a defendant is unable to pay the witness' expenses is he required to apply to the court for issuance of a subpoena. Under R.C.M. 703, on the other hand, the defense must go to the trial counsel for all witnesses. If the trial counsel opposes the request, then the defense may move the judge for production of witnesses. The trial counsel, of course, is the master of his own destiny in terms of production of witnesses the government wants, subject to fiscal limitations.

115. *Breeding*, 44 M.J. at 355.

116. AMERICAN HERITAGE DICTIONARY 1305 (1976).

117. *See supra* note 114 and accompanying text.

118. FRANCIS A. GILLIGAN & FREDERIC I. LEDERER, COURT-MARTIAL PROCEDURE 785 (1991) (suggesting this be done ex parte).

119. *See* MCM, *supra* note 5, R.C.M. 701(b)(1)(A).

120. 44 M.J. 766 (N.M.Ct.Crim.App. 1996).

121. *Id.* at 769. The Naval Investigative Service (NIS) and Bureau of Alcohol, Tobacco and Firearms (ATF) began a joint investigation after ATF agents noticed that the accused, who was not registered as a gun dealer, bought many handguns in a short period of time. One weekend, they found out from an informant that the accused would be driving from Virginia, where he worked, to New York City to see his family. Although guns were not mentioned, ATF and NIS agents, riding in unmarked cars, watched the accused pick up three people and drive north. As the convoy drove through Maryland, state troopers stopped the ATF car for speeding. *Id.* When apprised of the mission, state troopers agreed to stop the accused under the pretext of a traffic stop. A trooper stopped the accused for tailgating. After receiving a warning for the traffic offense, the trooper asked if he could search the car and the accused agreed. *Id.* at 770. After the search (conducted by a state trooper and ten ATF agents) began, an ATF agent questioned the accused. No guns were found during the search, which lasted an hour and a half, but the accused was arrested after he made certain admissions. *Id.*

122. *Id.* at 777. Outtakes are tapes that are not shown during the broadcast.

123. UCMJ art. 46 (1988) (trial counsel and defense counsel shall have equal opportunity to obtain witnesses and evidence).

the proceedings, as several witnesses testified about the stop and the government was willing to stipulate to the testimony of another defense witness.

Another case dealing with the subpoena power involved the judge's authority to rule on a challenge to subpoenas issued pursuant to the Right to Financial Privacy Act (RFPA).[125] In *United States v. Curtin*,[126] the trial counsel issued subpoenas for financial records belonging to the accused's wife and father. They received notice, as required by law, and moved to challenge the subpoenas at accused's court-martial. The military judge refused to act on the motion, holding that the proper forum was federal district court because the subpoenas were administrative, issued by the trial counsel and not by the judge.[127]

The CAAF held that the subpoenas were "judicial"[128] within the meaning of both the RFPA and R.C.M. 703. When a trial counsel issues such a subpoena, he performs a function similar to that of a United States district court clerk.[129] The proper place to challenge an RFPA subpoena is in "the court which issued the subpoena." The appellate court concluded that when the trial counsel issues the subpoena, the forum for challenge is a court-martial.[130]

Ineffective Assistance of Counsel

The Sixth Amendment also guarantees that the accused is entitled to effective assistance of counsel.[131] The seminal case of *Strickland v. Washington*[132] established the test for ineffective assistance of counsel: deficient performance by counsel and prejudice to the accused, that is, errors so serious that the accused did not receive a fair trial.[133] *United States v. Harness*[134] deals with the aftermath of a Marine who lied about passing the bar when he applied to the Marine Corps for a commission as a judge advocate.[135] The Marine captain and a civilian lawyer jointly represented the accused at his court-martial. On appeal, the defense did not raise ineffective assistance of counsel; rather, it argued that the accused's Article 38[136] right to be represented by qualified military counsel had been violated because his detailed military counsel fraudulently obtained his certification.

Conceding that the government failed to comply with Article 38, the Navy-Marine court then explored whether that failure materially prejudiced "substantial rights of the accused." The court held that the proper framework for such an analysis was the *Strickland* test and concluded that the joint efforts of both counsel in this case constituted adequate performance.[137]

The question then becomes: is it better to be represented by someone who has not passed the bar or one who sleeps through

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124. *Rodriguez*, 44 M.J. at 778. To overcome the First Amendment barrier, the defense would have to have shown that the tapes were "highly material, necessary or critical to an issue at trial, and not obtainable from other sources." *Id.* at 777.

125. The RFPA prescribes procedures for the government to follow in obtaining financial records. The government must provide notice to the person whose records are being sought. Additionally, the notice must include a description of the means to challenge the subpoena. 12 U.S.C. §§ 3405, 3407 (1988).

126. 44 M.J. 439 (1996) (citing 12 U.S.C. §§ 3401-12 (1988)).

127. *Id.* at 440. The government filed a petition for extraordinary relief asking that the judge be ordered to exercise jurisdiction and consider the challenges to the subpoenas.

128. DEP'T OF ARMY, REG. 190-6, OBTAINING INFORMATION FROM FINANCIAL INSTITUTIONS, para. 2-5b (15 Jan. 1982) (IO1, 9 Apr. 1990) (judicial subpoena includes a subpoena issued pursuant to R.C.M. 703 and Article 46).

129. *Curtin*, 44 M.J. at 441. The fact that the trial counsel acts in a ministerial capacity does not make the subpoena an administrative one.

130. *Id.*

131. U.S. CONST. amend. VI ("In all criminal Prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence").

132. 466 U.S. 668 (1984).

133. *Id.* at 687. The Court explained that prejudice is shown if there is a reasonable probability that, but for counsel's errors, the result would have been different. *Id.* at 694. In *Lockhart v. Fretwell*, 506 U.S. 364 (1993), the Supreme Court further clarified the prejudice prong: it focuses on whether the trial result was unfair or unreliable, not simply on whether the outcome might have been different.

134. 44 M.J. 593 (N.M.Ct.Crim.App. 1996).

135. Captain Jeff Zander graduated from law school but never passed a bar exam. He fraudulently obtained another man's bar certificate from the state of California by misrepresenting that he had changed his name. He then applied to the Marine Corps, falsely asserting that he was a member of the California bar. Captain Zander was court-martialed for false official statement as well as wearing unauthorized medals. Lincoln Caplan, *The Jagged Edge*, ABA JOURNAL, Mar. 1995, at 52. *See* MCM, *supra* note 5, pt. IV, paras. 31, 113.

136. UCMJ art. 38 (1988) (the accused may be represented by detailed military counsel who is detailed under article 27).

137. *Harness*, 44 M.J. at 595. The court declined to adopt a per se rule of ineffectivenss when an unlicensed attorney represents the accused.

court? In *Tippins v. Walker*,[138] a case in a civilian jurisdiction, the defense counsel was "unconscious for numerous extended periods of time during which the defendant's interests were at stakes." He slept every day of trial and the judge reprimanded him twice.[139] Without deciding whether a sleeping counsel creates per se prejudice under the *Strickland* test, the Second Circuit found prejudice.

Ineffective assistance of counsel during the pre-sentencing phase was at issue in *United States v. Boone*.[140] After the accused was found guilty of attempted rape and rape,[141] his civilian defense counsel presented no extenuating or mitigating evidence except for a short unsworn statement, which counsel gave orally on the accused's behalf.[142] The members sentenced the accused to a dishonorable discharge, confinement for sixty years, reduction to E1 and total forfeitures.[143]

After reviewing affidavits from both counsel, the CAAF found that the civilian counsel, either alone or in conjunction with the military counsel, was ineffective. Although the military counsel interviewed three noncommissioned officers who had positive things to say about the accused's duty performance and attitude, and the accused had a good military record up to that point, including service in Germany and during Operation Desert Storm, civilian counsel apparently did not explore this potential evidence. The accused's uncle, an Air Force major who paid the civilian counsel's fees and was willing to testify, also would have been a helpful witness. The court reassessed the sentence and reduced the confinement to forty years.[144]

In an interesting Air Force case, faulty legal advice to the accused concerning contact with witnesses was held ineffective assistance of counsel. In *United States v. Sorbera*,[145] the accused, a thirty-six year old technical sergeant with seventeen years of service, was charged with indecent acts with his eleven year old daughter by a previous marriage.[146] The accused, a deeply religious person, vigorously denied the allegations. His command ordered him not to have any contact with his daughter. Suspicious that the allegations were based on a custody dispute, his civilian defense counsel advised the accused to call his ex-wife and offer her custody of the girl and child support, to advise her of the consequences if the girl continued to lie, and to find out if the mother was using the girl as a pawn.[147]

The accused called his ex-wife, and during the one-hour conversation, urged his ex-wife to prevent the girl from continuing to lie and from returning to Germany to testify.[148] The command preferred an additional charge of obstruction of justice. He was convicted of obstruction of justice and acquitted of indecent acts.[149] The Air Force Court of Criminal Appeals held that pretrial advice may constitute ineffective assistance of counsel where, as here, counsel failed to caution the client of

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138. 58 CRIM L. REP. (BNA) 1548 (2d Cir. Mar. 7, 1996).

139. *Id.* The periods of time during which he slept included the testimony of a critical prosecution witness and the co-defendant.

140. 44 M.J. 742 (Army Ct. Crim. App. 1996).

141. *Id.* at 743. The accused was convicted of raping two women, whom he met at nightclubs. His defense was consensual sex with one woman and he denied ever meeting the other woman. He was convicted of attempted rape of a third woman, whom he met at the same club as one of the other rape victims. The accused claimed that this sex was also consensual. United States v. Boone, 42 M.J. 308, 309-11 (1995).

142. *Boone*, 44 M.J. at 743 n.1. The unsworn statement described the accused's background, noted that this was his first disciplinary incident, and expressed remorse for the events. No witnesses were called despite willingness of the accused's mother and uncle to testify. *Id*. The accused filed a complaint about his counsel's services with the State Bar of Texas. That complaint resulted in a public reprimand of the lawyer for "neglecting a legal matter entrusted to him." United States v. Boone, 39 M.J. 541, 542 (A.C.M.R. 1994).

143. *Boone*, 44 M.J. at 743. The convening authority reduced the length of confinement to fifty years. *Id.* After the Army Court of Military Review initially affirmed the case, 39 M.J. 541 (A.C.M.R. 1994), the CAAF remanded the case for factfinding on effectiveness of counsel during sentencing. *Boone*, 42 M.J. at 314.

144. *Boone*, 44 M.J. at 746-47. The appellant had also argued that his mother was ready and willing to testify about his background and good character. *Id*. at 743. In his affidavit in response to the court's concerns, the civilian defense counsel said that the accused specifically stated that he did not want his mother at the court-martial. The court accepted counsel's explanation. *Id.* at 746.

145. 43 M.J. 818 (A.F. Ct. Crim. App. 1995).

146. *Id.* The girl came to Germany to live with the accused and his second wife. She stayed with them for three and a half years, but began to have problems so she returned to the United States to live with her mother. After living with her mother for seven months, she wrote a note claiming that the accused had molested her. *Id*. at 820.

147. *Id.* The accused told him about the no contact order, but the attorney said it was permissible to call because the accused would talk with the ex-wife and not the daughter. *Id.*

148. *Id.* They also discussed child support, custody, and the ramifications to mother and daughter if the daughter testified against him. The next day the accused told his military counsel about the call, who advised him that it probably was not a good idea to have made the call. Meanwhile, the ex-wife reported the call to the legal office at a nearby military installation. *Id.*

149. *Id.* Apparently the girl's credibility was poor, and the defense called several good character witnesses. *Id.*

the potential drawbacks. The advice was unreasonable under prevailing professional norms and, therefore, constituted deficient performance, especially in light of the fact that the accused was unaware of the legal consequences of his action.[150] His conviction on the obstruction of justice charge established prejudice because the accused had no reason to believe that following the advice would result in an additional charge.[151]

Discovery

This year's developments in the area of discovery illustrate the liberal attitude the military has towards the release of information to the accused.[152] Failure to scrupulously follow discovery obligations continues to haunt trial counsel and creates needless appellate litigation. When prosecuting related cases,it can be a trial counsel's organizational nightmare to ensure that all the evidence is disclosed to the different defense counsel handling the cases. That may have been what led to the discovery problem in *United States v. Romano*.[153] In *Romano*, an investigation began into charges that the accused fraternized with a female servicemember, Airman Mucci. Mucci initially told her first sergeant that she dated the accused, then later told others that she had lied. Eventually charges were preferred against Airman Mucci, the accused, and another servicemember, Sergeant Mitchell.[154] Two witnesses testified at Sergeant Mitchell's Article 32 hearing that Mucci told them that she lied to the first sergeant about the accused.[155]

At trial, Airman Mucci testified that she had dated the accused. After the trial, the defense discovered that the two prior inconsistent statements Mucci made to the witnesses who testified at Sergeant Mitchell's Article 32 hearing had not been disclosed, despite a defense request.[156] The Air Force court held that the statements should have been disclosed under R.C.M. 701(a)(2)(A).[157] In addition, the government should have turned them over as *Brady*[158] material because the statements directly contradicted the airman's testimony and reflected on her credibility. Nevertheless, the nondisclosure was harmless beyond a reasonable doubt because other prior inconsistent statements were brought out at trial.[159]

Although oversights like the above occur, most trial counsel are aware of the duty to turn over exculpatory material to the defense. As a result of *United States v. Simmons*,[160] counsel are also on notice that they must seek out and disclose to the defense favorable examinations, tests, and experiments in the

150. *Id.* at 821. The court acknowledged that the exact language the attorney used was unclear; however, he had advised the accused to make the call with the intent to discourage the girl from testifying. The court concluded that any competent counsel should have seen the danger of this approach and taken steps to ensure that the accused did not exceed permissible grounds. *Id.*

151. *Id.* at 822. The findings and sentence were set aside and the charge dismissed. *Id.*

152. *See* United States v. Hart, 29 M.J. 407 (C.M.A. 1990) (discovery available to the accused in courts-martial is broader than the discovery rights granted to most civilian defendants); MCM, *supra* note 5, R.C.M. 703 analysis, app. 21, at A21-31-32.

153. 43 M.J. 523 (A.F. Ct. Crim. App. 1995), *petition granted*, 44 M.J. 76 (1996).

154. *Id.* at 525. Sergeant Mitchell was Airman Mucci's immediate supervisor and tried to persuade her to deny any social relationship with the accused. The noncommissioned officer was also in frequent contact with the accused during the investigation. *Id.*

155. *Id.* at 526. A master sergeant (E-7 in the Air Force) who worked for the first sergeant testified that Airman Mucci admitted to him that she had lied to the first sergeant when she said she dated the accused. An Air Force judge advocate who had previously represented Sergeant Mitchell in an unrelated matter, testified that Airman Mucci spoke to him on the phone and told him that the legal office and her defense counsel were trying to get her to lie about her relationship with the accused. *Id.* at 525.

156. *Id.* at 526. Prior to trial the defense requested disclosure of statements by potential witnesses, exculpatory evidence, or "any known evidence tending to diminish credibility of witnesses." *Id.*

157. *Id.* at 527. That part of the rule requires the trial counsel to disclose "books, papers, documents" that are within the "possession, custody, or control of military authorities" and which are "material to the preparation of the defense." MCM, *supra* note 5, R.C.M. 701(a)(2)(A).

158. Brady v. Maryland, 373 U.S. 83 (1963). The seminal Supreme Court discovery case held that the failure to disclose material evidence favorable to the defense violates due process. The military's version of the *Brady* requirement is in R.C.M. 701(a)(6), which provides:

> *Evidence favorable to the defense.* The trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to :
> (A) Negate the guilt of the accused of an offense charged;
> (B) Reduce the degree of guilt of the accused of an offense charged; or
> (C) Reduce the punishment.

159. *Romano*, 43 M.J. at 527-28. The court noted that the statements actually could have hurt the defense case by supporting the prosecution theory that Sergeant Mitchell, Airman Mucci and the accused conspired to obstruct justice. *Id.* at 528.

160. 38 M.J. 376 (C.M.A. 1993). *Simmons* involved the failure to disclose statements made to a CID polygrapher by two sexual assault victims. Statements by one of the victims reflected an ambivalent attitude towards the accused's actions. Neither counsel knew about the statements, but the CAAF held that the language of R.C.M. 701(a)(2)(B) required the trial counsel to "exercise due diligence" in searching for such information. *Id.* at 381.

hands of military investigative authorities. The Navy-Marine court recently extended that duty to information in the hands of other official agencies within the military.

In *United States v. Sebring*,[161] the accused was found guilty of use of marijuana based on a positive urinalysis result. The government evidence included testimony by the executive officer of the Navy drug lab that tested the accused's sample. He testified about the procedures at the lab and their high degree of reliability, which he described as "99.99 percent" accurate.[162] The defense focused on lax collection efforts at the unit, and also presented good character evidence.[163] Unknown to both trial and defense counsel, a quality control report existed that described "data alteration" at the lab over a six-month period, starting one month before the accused's sample was tested.[164]

The court noted the submission of a defense discovery request and held that quality control reports fall within the type of information subject to disclosure under R.C.M. 701(a)(2)(B).[165] The materiality[166] of the information was the next issue the court addressed. The court relied on the "reasonable probability" standard[167] and noted recent Supreme Court holdings describing that test as a determination of whether the non-disclosed evidence could put the case in such a different light as to undermine confidence in the verdict.[168] Although the defense did not specifically attack the lab results, the report of problems at the lab could have been used to impeach the lab's reliability and minimize the value of the test results. The court concluded that the information could have put the whole case in a different light.[169]

In dicta, the Navy-Marine court discussed the parameters of the *Simmons* case. Notwithstanding *Simmons's* limitation of the due diligence requirement to disclose tests, experiments and exams under R.C.M. 701(a)(2)(B) and the absence of any "due diligence" language in other parts of the discovery rule, the service court nevertheless concluded that this duty extends to all *Brady* material. The court relied on *Kyles v. Whitley*[170] for this proposition, pointing out that the prosecutor has a duty to learn about information in the hands of other entities that act on the government's behalf.[171] In this case, the trial counsel had a duty to discover and disclose the information held by a government drug lab that was favorable to the accused. One issue that

161. 44 M.J. 805 (N.M.Ct.Crim.App. 1996).

162. *Id.* at 806. The Navy Drug Screening Laboratory in Norfolk, Virginia tested accused's sample. The executive officer, who testified as an expert, testified about the methods used to test drug samples, the results of tests run on accused's sample, and the significance of those results. *Id.*

163. *Id.* The accused testified that someone tampered with her sample when she left it unattended for fifteen to twenty minutes while she helped another service-member who got sick during the urinalysis. The defense did not attack the testing procedures of the drug lab. The defense also presented testimony that the accused was a good duty performer who would not have used drugs because she was trying to get pregnant and thought she was pregnant at the time. *Id.*

164. *Id.* at 807. The report was the result of an internal investigation. Although the trial counsel did not know the report existed, both the commanding officer and executive officer of the lab did. *Id.* The report was not disclosed despite a defense request for "all quality control program reports and records of incidents of employee errors, negligence and misconduct in processing urine samples." *Id.*

165. *Id.* (citing MCM, *supra* note 5, R.C.M. 706(a)(2)(B)). R.C.M. 706(a)(2)(B) provides, upon request by the defense, for disclosure of:

> results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of military authorities, the existence of which is known, or by the exercise of due diligence may become known, to the trial counsel, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial.

See Sebring, 44 M.J. at 808 n.1 (observing that the 1994 and 1995 editions of the *Manual for Courts-Martial* deleted the words "or by the exercise of due diligence may become known").

166. Materiality should be distinguished from relevance. In a discovery context, materiality refers to the effect the information would have had on the trial if it had been disclosed. United States v. Agurs, 427 U.S. 97 (1976). Just because something is relevant does not mean it is material. "It requires 'some indication that the pretrial disclosure of the disputed evidence would have enabled the defendant significantly to alter the quantum of proof in his favor.'" United States v. Branoff, 34 M.J. 612 (A.F.C.M.R. 1992) (quoting United States v. Ross, 511 F.2d 757, 763 (5th Cir.), *cert. denied*, 423 U.S. 836 (1975), *set aside on other grounds & remanded*, 38 M.J. 98 (C.M.A. 1993)).

167. A "reasonable probability" is "a reasonable probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. 668, 694 (1984). In terms of materiality of nondisclosed evidence, it is material if there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1984).

168. *Sebring*, 44 M.J. at 809 (citing Kyles v. Whitley, 115 S. Ct. 1555, 1567 (1995)).

169. *Id.* at 810. Rather than a test of sufficiency of the evidence, the focus is on whether confidence in the verdict is undermined. In this case it was. *See Kyles*, 115 S. Ct. at 1566; Donna M. Wright, Note, *Will Prosecutors Ever Learn? Nondisclosure at Your Peril*, ARMY LAW., Dec. 1995, at 74, 77.

170. 115 S. Ct. 1555 (1995).

171. *Sebring*, 44 M.J. at 810.

remains is what other agencies act on the government's behalf. It requires no torturous thinking to conclude that a military drug lab testing urine samples for the presence of illicit drugs was "acting on the government's behalf." Consider other scenarios: a statement made by an assault victim to medical personnel at a military hospital that he did not see his assailant; a comment by a registered source to a drug and alcohol counselor that he continued to use drugs while working for the government. Do those agencies act on the government's behalf? If so, the next question concerns the limits of due diligence. These are the disclosure issues that the military courts will likely face in the near future.

The Supreme Court this term determined the standard to be applied when the defense requests documents for a claim of selective prosecution. The African-American defendants in *United States v. Armstrong*[172] were charged with various drug and firearms offenses in federal court. They moved for discovery or in the alternative, dismissal of the indictment, on the grounds that they were prosecuted because of their race.[173] The district court granted the motion for discovery and ordered the government to produce a number of documents in connection with the case.[174]

The Supreme Court, in an opinion written by Chief Justice Rehnquist, began its analysis by looking at Federal Rule of Criminal Procedure 16, which provides for the disclosure of documents in the government's possession that are either material to the preparation of the defense or intended for use by the government in its case-in-chief.[175] Regarding the materiality requirement, the Supreme Court ruled that the term "defense" means a defense on the merits, not the litigation of motions.[176]

The Court held that selective prosecution is not a defense to the merits of a charge itself. Selective prosecution claims have a high standard, so discovery for such claims should also have a high standard. That standard is a credible showing of different treatment of similarly situated persons.[177]

Arguably, the case may be of limited precedential value to the military practitioner because of Article 46 and the military's more liberal attitude towards disclosure to the defense.[178] It is likely that the military would not take the narrow view of "material to the preparation of defense"[179] that the Supreme Court did. In addition, even if not discoverable under R.C.M. 701(a)(2)(B), documents relating to a selective prosecution claim might be relevant during the sentencing proceedings and therefore, subject to disclosure under provisions of R.C.M. 701(a)(6).[180] Playing it "safe" is always the best policy for the government in the area of discovery; a conviction has never been overturned because too much information was disclosed to the defense.

The final discovery case to figure prominently this year involved the destruction of evidence. In *United States v. Mantilla*,[181] the accused was convicted of wrongfully possessing,

172. 116 S. Ct. 1480 (1996).

173. *Id.* at 1483. The only support for their motion was an affidavit by a "paralegal specialist," who worked at a federal public defender office. The affidavit stated that there were twenty-four federal drug cases handled by that office in a one-year period, and in every case the defendant was African-American. A study was attached that listed the name of each of these defendants, their race, whether they were prosecuted for cocaine or crack, and the status of each case. *Id.*

174. *Id.* at 1484. The district court ordered the government to (1) provide a list of all cases in the last three years where the government charged both cocaine and firearms offenses, (2) identify the races of those defendants, (3) identify the levels of law enforcement used to investigate those cases, and (4) explain its criteria for prosecuting those defendants for federal cocaine offenses. *Id.* The government moved for reconsideration, which was denied. The government asked the court to dismiss the indictments so it could appeal. A three-judge panel of the Ninth Circuit reversed, holding that the defense must show a colorable basis for believing that others similarly situated have not been prosecuted. The Ninth Circuit en banc affirmed the district court, agreeing that the defense need not make this showing. *Id.*

175. *Id.* at 1485 (citing FED. R. CRIM. P. 16(a)(1)(C)). That section of the rule mirrors R.C.M. 701(a)(2)(A) to a large extent. *See supra* note 157.

176. *Armstrong*, 116 S. Ct. at 1485. The Court reasoned that the plain language of the rule demanded such a reading. The second phrase requires disclosure of evidence that will be used by the government in its case in chief. Therefore, a "symmetrical" reading of the rule would mean that "preparation of the defense" is limited to preparation for the defense on the merits. *Id.* Also, under a different part of rule 16, the defense is not entitled to government work product, that is, reports, memoranda, and other internal documents made by the government in connection with the investigation or prosecution of the case. FED. R. CRIM. P. 16(a)(2). The Court indicated that it would make no sense to allow the defendant access to documents concerning other cases and not his own. *Armstrong*, 116 S. Ct. at 1485.

177. *Armstrong*, 116 S. Ct. at 1489. The defense failed to meet that standard. The only evidence presented was the following: (1) an affidavit by an intake coordinator at a drug clinic which claimed that an equal number of Caucasian and minority dealers and users sought treatment, (2) an affidavit from a criminal defense attorney that in his experience many non-African Americans were prosecuted in state court, and (3) a newspaper article that federal crack criminals were punished more severely than powdered cocaine offenders and every one was African-American. The Supreme Court dismissed these conclusions as based on "anecdotal evidence and hearsay." *Id.*

178. *See supra* note 152; s*ee also* United States v. Eshalomi, 23 M.J. 12 (C.M.A. 1986) (when Congress enacted Article 46, discovery rights for state and federal defendants were almost nonexistent, and it intended more generous discovery for the military accused).

179. *See supra* note 165.

180. *See supra* note 158.

181. No. ACM 31778, 1996 WL 520980 (A.F. Ct. Crim. App. Sept. 12, 1996).

distributing, and communicating the contents of materials for an Air Force promotion exam to another noncommissioned officer, who testified against him. During pretrial preparation, defense counsel learned that the witness made flash cards and wrote notes on his study guide. The defense requested these materials, but the witness had already destroyed them.[182]

The Air Force court found no violation of due process. No bad faith was shown, law enforcement personnel never possessed the materials, and the witness was not credible when he said that agents told him it was permissible to throw out the study materials. Finally, the materials had no apparent exculpatory value.[183]

Mental Responsibility/Competency to Stand Trial

The Supreme Court reviewed a state's competency standard this term. Oklahoma's competency standard requires a defendant to prove by clear and convincing evidence that he is not competent to stand trial.[184] The defense in *Cooper v. Oklahoma*[185] raised the issue of the defendant's competency several times before and during the trial.[186] In a unanimous opinion, the Court confronted the issue of what competency standard is constitutionally required. The Court noted that the test for competency is whether a defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding; that is, whether he has a rational and factual understanding of the proceedings.[187] The Court also acknowledged its precedent that a state could place the burden of proof on a defendant to show his incompetence by preponderance of the evidence.[188] Writing for the Court, Justice Stevens then traced the foundations of the competency standard.[189]

The Court concluded that the clear and convincing standard violates due process, because it allows the state to try a defendant who more likely than not is incompetent. It rejected the state's argument that the state's interest in efficient operation of the criminal justice system outweighs the defendant's right to be tried only while competent.[190]

If the defense counsel who sleeps during trial provides ineffective assistance of counsel,[191] is the defendant who falls asleep not competent to stand trial? The Eleventh Circuit recently answered that question in the negative.[192] The defendant slept through "about 70% of his 5 day murder trial" and could not be awakened when the jury departed for deliberations.[193] The judge inquired several times about his physical

182. *Id.* at *3. The defense contended that these materials not only would have shown that the witness had the motive and opportunity to frame the accused, but also that the witness had more answers than just those given to him by the accused. The witness testified at trial that he did not use the materials the accused gave him but made his own flash cards and study guide from his own notes. He said he discarded them after his exam as he always did, before the defense asked for them. The witness also insisted that he checked with OSI agents and they agreed to the destruction. The agents denied ever telling the witness it was fine to dispose of the materials. *Id.*

183. *Id* at *4*; see* California v. Trombetta, 467 U.S. 479 (1984) (no violation of due process for failure to preserve breath samples of drunk driving suspects where exculpatory value of evidence not apparent before destruction, other comparable evidence available, and evidence would not have played a significant role in case).

184. OKLA. STAT., tit. xxi, § 1175.4(B) (1991).

185. 116 S. Ct. 1373 (1996).

186. *Id.* at 1375-76. First, at a pretrial hearing a state clinical psychologist testified that the defendant was not competent and the judge committed him to a state mental health treatment center. Three months later he was released. At a later competency hearing, two psychologists, both working for the state, gave different opinions of the defendant's competence. The judge found him competent. A week before trial, the defense counsel raised the issue again, complaining that the accused refused to talk to him. The judge adhered to his earlier ruling. Once the trial began, the accused refused to wear a suit, insisting that it was "burning" him. He also talked to himself and a spirit who advised him, and on the stand stated that the lead defense counsel wanted to kill him. During his testimony, the defendant shrank in a corner of the witness stand, and when defense counsel approached him he backed up so far he fell off the witness chair and banged his head on a marble wall. The judge still found him competent but said: "My shirtsleeve opinion of Mr. Cooper is that he's not normal. Now to say he's not competent is something else." Further along in the trial, defense counsel moved for a mistrial based on the defendant's behavior. The record of trial reflects that he did not talk to his attorneys, refused to sit near them, remained in prison overalls throughout the trial, crouched in a fetal position and talked to himself. *Id.* at 1376.

187. *Id.* at 1377 (quoting Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam)).

188. *Id.* (citing Medina v. California, 505 U.S. 437 (1992)).

189. *Cooper,* 116 S. Ct. at 1377-80. The Court pointed out that there is little or no guidance as to what standard was applied at early common law. Later cases suggested a preponderance standard. *Id.* In the United States, until recently, all states used the preponderance standard. Even now, a majority of states and the federal government require either a preponderance standard by the accused or the government. *Id.* at 1379-80. Only three other states use the same standard as Oklahoma. *Id.* at 1380 n.16 (citing CONN. GEN. STAT. § 54-56d(b) (1995); 50 PA. CONS. STAT. § 7403(a) (Supp. 1995); R.I. GEN. LAWS § 40.1-5.3-3(Supp. 1995)).

190. *Cooper,* 116 S. Ct. at 1382-83. The Court rejected two other arguments advanced by the state. The state contended that the standard for competency should be the same as the minimal standard for involuntary civil commitment, held to be clear and convincing evidence in *Addington v. Texas*, 441 U.S. 418 (1979). Justice Stevens explained that competency and involuntary commitment decisions address different issues: the former whether the defendant understands the charges and proceedings against him, and the latter whether the defendant is a threat to himself or others. *Cooper,* 116 S. Ct. at 1383-84. The Court also rejected the state's assertion that competency was a procedural rule, which is within the state's authority to promulgate. The Court concluded that a competency standard implicates a fundamental constitutional right and therefore must satisfy the due process clause. *Id.* at 1383.

191. *See supra* text accompanying notes 138-139.

condition and received assurances from the defendant that he was not using alcohol or drugs.[194] After defendant's murder conviction, a psychologist examined him and learned that he had not been sleeping at night because he was using crack and was worrying about the trial.

The standard for competency is whether the accused understands the nature of the proceedings and can assist in the preparation of his defense.[195] Here, the facts raised no substantial doubt about his competency. Even though he slept, he gave lucid and rational answers when the judge questioned him. There was no reason to think he could not communicate with his lawyer about strategy.[196]

Anyone involved in the administration of military justice can request a sanity board.[197] Of course, the defense counsel is the normal requester. Frequently, the government does not want to conduct a sanity board because it believes it is a defense delay tactic. Occasionally, a preexisting mental evaluation of the accused is available that may qualify as an "adequate substitute."[198]

In *United States v. English*,[199] the question of an adequate substitute arose when the accused referred himself to a naval hospital for depression and suicidal thoughts. A psychiatrist and clinical psychologist evaluated him, concluded he was exaggerating his symptoms and reported this to the command. After the command preferred charges of malingering and attempted malingering, the defense requested a sanity board. After hearing the testimony of the two mental health professionals, the judge found the prior mental evaluations to be "adequate substitutes" for a sanity board.[200]

The Navy-Marine court agreed that the evaluations were adequate substitutes, relying on the testimony of the psychiatrist and psychologist that: (1) their exams complied with R.C.M. 706 requirements, including the questions to be addressed; (2) the accused was competent to stand trial and mentally responsible for his actions; and (3) if ordered to conduct a sanity board, they would not need to interview the accused any further or change their opinions regarding his mental status.[201]

Another issue in the case was whether the statements the accused made to the psychiatrist and psychologist were privileged.[202] Curiously, while arguing that these evaluations were adequate substitutes, the government also maintained that because they were not ordered pursuant to R.C.M. 706, statements by the accused were not privileged. Both the trial judge and the appellate court sided with the government, reasoning that the privilege is designed to accommodate the purpose of R.C.M. 706, not to provide a forum for privileged communications for the accused.[203]

Nonjudicial Punishment

The frequent reliance by trial counsel on records of nonjudicial punishment during the pre-sentencing phase guarantees their continued discussion at the appellate level. The issue of

192. Watts v. Singletary, 59 CRIM. L. REP. (BNA) 1411 (11th Cir. July 18, 1996).

193. *Id.* at 1411. The judge was sufficiently concerned about the effect on the factfinder that he instructed the jury not to consider it in their deliberations.

194. *Id.* On the first day of trial the judge noted that the defendant was sleeping. On the second day he asked whether the defendant was using drugs, prescribed or otherwise, or alcohol. The defendant said no and refused to admit that he had been sleeping. He also denied that he was sick or that he had ever been treated for mental illness. *Id.*

195. Dusky v. United States, 362 U.S. 402, 402 (1960).

196. *Singletary*, 59 CRIM L. REP. at 1411. "A represented defendant generally has limited responsibility in conducting his defense and need not participate in the bulk of trial decisions." *Id.* Additionally, because defense counsel did not raise the issue during trial, the court concluded that the situation must not have been that serious. *Id.*

197. Any commander, investigating officer, trial counsel, defense counsel, military judge or court member may request that a sanity board be ordered. MCM, *supra* note 5, R.C.M. 706(a).

198. United States v. Jancarek, 22 M.J. 600 (A.C.M.R. 1986) (evaluation was adequate substitute where it was done by a physician who had completed psychiatric residency, evaluated the accused knowing he was pending charges, and provided a specific diagnosis and testified extensively about his competency to stand trial).

199. 44 M.J. 612 (N.M.Ct.Crim.App. 1996).

200. *Id.* at 613.

201. *Id.* at 613-14.

202. MIL. R. EVID. 302 creates a privilege for statements made by an accused at a mental examination ordered under provisions of R.C.M. 706. Neither the statement nor any derivative evidence can be used as evidence against the accused. MCM, *supra* note 5, MIL. R. EVID. 302. The defense had argued that the rule should apply retroactively. *English*, 44 M.J. at 614.

203. *English*, 44 M.J. at 614-15. This seems to be an incongruous result: on the one hand the evaluation amounts to a sanity board, but on the other hand, it is denied the normal attributes of a sanity board.

proper credit for prior Article 15[204] punishment arose again this term. The *Manual for Courts-Martial* makes it clear that a military member who receives nonjudicial punishment may be court-martialed for the same offense only if it is serious.[205] Even then, the military member must receive complete credit for any punishment already imposed.[206] According to the military's highest court, the convening authority should give the credit.[207]

Last year, the CAAF held that the judge could calculate the credit.[208] In that case, the military judge explained how he offset each form of punishment against each element of the sentence. *In United States v. Castelvecchi*,[209] however, the judge instructed the members to calculate the credit themselves. His instructions were confusing: he told them to determine a sentence for all the offenses that the accused was guilty of and then determine how much of that sentence was attributable to the offense that was the subject of the Article 15. The judge also gave them the wrong equivalent punishment for converting extra duty and restriction to confinement.[210]

This case serves to remind counsel that the best person to calculate the credit is the convening authority.[211] It can be too complicated for the members and, even if the judge is the sentencing authority, there is a greater risk that he will not articulate his math on the record, leaving it unclear whether the accused received appropriate credit.

In a fairly significant case, the CAAF recently rejected the Navy-Marine court's attack on the continued viability of *Booker* warnings. *United States v. Booker*[212] requires that a servicemember be afforded the opportunity to consult with counsel in deciding whether to accept nonjudicial punishment before that Article 15 is admissible at a court-martial. In *United States v. Kelley*,[213] the Navy-Marine Corps Court of Criminal Appeals last year held that *Booker* was no longer good law in light of recent Supreme Court rulings.

In an opinion authored by Senior Judge Everett, the CAAF upheld *Booker* requirements.[214] Records of nonjudicial punishment and summary courts-martial are still not admissible unless the government can show that the accused was afforded the opportunity to consult with counsel. This requirement guarantees a statutory right, that is, the member's right to turn down the proceedings and demand trial by court-martial, a proceeding at which counsel is afforded.

Conclusion

While the CAAF was willing to expand the list of firmly rooted hearsay exceptions, it was less excited about the prospect of further intrusions on the accused's right of confrontation by creating new alternative forms of testimony. It appears the court is trying to steer a middle ground: protecting the accused's constitutional rights while recognizing that occasionally other policy interests can outweigh those rights. Defense counsel should note that even if the client can sleep during trial,

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204. UCMJ art. 15 (1988).

205. UCMJ art. 15(f) (1988) (disciplinary punishment not a bar to trial by court-martial for a serious crime); MCM, *supra* note 5, pt. V, para. 1e (nonjudicial punishment for a non-minor offense does not bar court-martial; minor offense is one in which the maximum punishment would not include a dishonorable discharge or confinement over one year); MCM, *supra* note 5, R.C.M. 907(b)(2)(D)(iv) (prosecution is barred by prior Article 15 punishment for a minor offense).

206. United States v. Pierce, 27 M.J. 367 (C.M.A. 1989) (member must receive "day-for-day, dollar-for-dollar, stripe-for-stripe" credit).

207. *Id.* at 369. The convening authority is best suited to give credit because defense might not want to alert the court to the fact that an Article 15 was administered. *Id.*

208. United States v. Edwards, 42 M.J. 381 (1995); *see also* Donna M. Wright, *Sex, Lies, and Videotape: Child Sexual Abuse Cases Continue to Create Appellate Issues and Other Developments in the Areas of Sixth Amendment, Discovery, Mental Responsibility, and Nonjudicial Punishment*, ARMY LAW., Mar. 1996, at 81.

209. No. 9501455 (Army Ct. Crim. App. 1996), *petition denied*, 45 M.J. 8 (1996).

210. *Id.* The judge told the panel that the forty-five days of restriction and forty-five days of extra duty imposed on the accused was equivalent to thirty days of confinement. Two days of restriction, however, is equivalent to one day of confinement; for extra duty, the ratio is one and a half to one. *Pierce*, 27 M.J. at 369 n.5. So forty-five days of restriction is equivalent to twenty-two and a half days of confinement. Extra duty for forty-five days is equivalent to thirty days of confinement.

211. *See also* Message, Headquarters, Dep't of Army, DAJA-CL, subject: Sentence Credit (221600Z June 94) (convening authority action must state number of days of sentence credit).

212. 5 M.J. 238 (C.M.A. 1977).

213. 41 M.J. 833 (N.M.Ct.Crim.App. 1995) (en banc), *rev'd*, 45 M.J. 259 (1996). The lower court based its decision on Nichols v. United States, 511 U.S. 738 (1994), where the Supreme Court held that a misdemeanor conviction could be used as a prior conviction to enhance the sentence for a subsequent offense even if the defendant had not been represented by counsel. The Coast Guard Court of Criminal Appeals also criticized *Booker* and urged CAAF to relook the case, however it did not go as far as the Navy court in announcing *Booker's* death. United States v. Lawer, 41 M.J. 751, 754 (C.G.Ct.Crim.App.), *pet. denied*, 43 M.J. 159 (1995).

214. United States v. Kelley, 45 M.J. 260 (1996). It is interesting to note that Senior Judge Everett also authored United States v. Mack, 9 M.J. 300, 320 (C.M.A. 1980), where he explained that the rationale behind *Booker* warnings was to give practical meaning to the servicemember's right to turn down Article 15 or summary court-martial proceedings, rather than being grounded in constitutional concerns.

counsel cannot. Trial counsel must be ever vigilant of their disclosure obligations, not only with regard to information they know about, but also in connection with information they should exercise due diligence to find.